

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF SECRETARY

In the Matter of

Federal-State Joint Board on
Universal Service

DOCKET FILE COPY ORIGINAL

CC Docket No. 96-45

**JOINT REPLY COMMENTS OF
THE BUSINESS SOFTWARE ALLIANCE,
THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, AND
THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL**

The Business Software Alliance ("BSA"), the Information Technology Association of America ("ITAA"), and the Information Technology Industry Council ("ITI") (collectively, "the Information Technology Associations" or "IT Associations") hereby reply to the comments filed regarding the Recommended Decision adopted by the Federal-State Joint Board on Universal Service ("Joint Board").¹

I. THE COMMENTERS RECOGNIZE THAT ONLY ENTITIES THAT PROVIDE TELECOMMUNICATIONS SERVICES ON A COMMON CARRIER BASIS CAN BE REQUIRED TO MAKE PAYMENTS TO THE UNIVERSAL SERVICE SUPPORT MECHANISMS

The comments filed in this proceeding overwhelmingly support the position, taken by the three Information Technology Associations, that the Commission cannot require enhanced service providers ("ESPs") to make universal service payments. The commenters also agree that the Commission should not require private carriers to make such payments.

¹ See Federal-State Joint Board on Universal Service, Recommended Decision, CC Docket No. 96-45, FCC 96J-3 (released Nov. 8, 1996) [hereinafter "Recommended Decision"].

In their initial comments, the IT Associations demonstrated that the Commission may only require entities that provide telecommunications to make payments to the universal service fund.² Comments filed by numerous parties support the IT Associations' conclusion that enhanced services and other Information Technology products, including Internet service, are not telecommunications.³ Therefore, as the National Cable Television Association correctly concludes, entities that provide these products "cannot be required to contribute" to the universal service fund.⁴

Several commenters also expressed concern that the Joint Board may have used an overly expansive definition of "telecommunications carriers that provide interstate telecommunications services," which could be construed to subject private carriers that provide telecommunications to the same mandatory universal service contribution obligations as common carriers.⁵ In order to avoid any uncertainty, the Ad Hoc Telecommunications Users Committee

² See Comments of the Business Software Alliance at 6-7 [hereinafter "BSA Comments"]; Comments of the Information Technology Association of America at 9-11 [hereinafter "ITAA Comments"]; Comments of the Information Technology Industry Council at 4-5 [hereinafter "ITI Comments"].

³ See Comments of Keystone Communications Corporation at 4; see also Comments of the Commercial Internet Exchange Association at 2 [hereinafter "CIX Comments"]; Comments of the Interactive Services Association at 2.

⁴ Comments of the National Cable Television Association at 8 [hereinafter "NCTA Comments"].

⁵ See, e.g., Comments of the Lower Colorado River Authority at 6-7 ("LCRA urges the Commission to reject the Joint Board's narrow interpretation of 'other providers' of telecommunications services and to construe the statute in a manner consistent with well-settled judicial precedent in this area and the Commission's long history of permitting private operation . . ."); Comments of the American Public Power Association at 8 ("The Joint Board's heavy reliance upon the CMRS Second Report and Order is unwarranted.").

requested that the Commission clarify that private carriers are not subject to mandatory universal service contribution requirements.⁶ As Ad Hoc correctly explained, "both language and legislative history of the 1996 Act make it clear that Congress did not intend [to require] private carriers to contribute to universal service support, except to the extent that they also provide telecommunications services on a common carrier basis."⁷ The IT Associations fully support Ad Hoc's request for clarification.

II. IF THE COMMISSION ALLOWS SCHOOLS AND LIBRARIES TO OBTAIN SUBSIDIES FOR NON-TELECOMMUNICATIONS SERVICES AND PRODUCTS, IT MUST ESTABLISH A COMPETITIVELY NEUTRAL PROGRAM

In their comments, each of the IT Associations argued that, if the Commission establishes a program that will allow schools and libraries to obtain Internet Service, inside wiring, and/or customer premises equipment, then it must ensure that "all providers -- whether telecommunications carriers, non-carrier-affiliated enhanced service providers, or other entities -- may submit competitive bids . . . and, if successful . . . receive 'support payments' from the universal service funding mechanism."⁸

⁶ Comments of the Ad Hoc Telecommunications Users Committee at 20.

⁷ Id. at 19; see also Comments of Orion Atlantic at 6 ("[T]he explicit language in the definition of 'telecommunications carrier' in the statute . . . indicates that private carriers should not be subjected to mandatory contributions to the universal service support mechanisms.").

⁸ ITAA Comments at 4 (emphasis in original); see also BSA Comments at 4 ("[T]he principle of competitive neutrality requires that the Commission ensure that carriers are not given a competitive advantage by being the only entities eligible for universal support in this area."); ITI Comments at 6 (Section 254(h)(2) "prohibits the Commission from establishing reimbursement rules that would tilt the competitive playing field . . . in favor of carriers.").

Various educational institutions,⁹ cable operators,¹⁰ wireless providers,¹¹ and IT companies¹² also support the position that non-carriers should be allowed to participate in the schools and libraries program.¹³ A number of commenters, however, oppose the participation of ESPs and other non-telecommunications providers in the schools and libraries program. These parties make two basic arguments. They first contend that allowing non-carriers to receive universal service support payments would violate the statutory requirement, contained in Section 254(h)(2), that the schools and libraries program be "competitively neutral"

⁸(...continued)

The IT Associations also supported the Joint Board's recommendation that schools be required to develop technology plans. See BSA Comments at 3; ITI Comments at 7. Every party that addressed this issue took the same position. See Comments of MCI Telecommunications Corp. at 17 [hereinafter "MCI Comments"]; Comments of Ameritech at 22; Comments of Teleport Communications Group at 10 [hereinafter "TCG Comments"]; NCTA Comments at 22-23; CIX Comments at 7; Comments of the Ohio Department of Education at 6; Comments of the Education and Library Network Coalition at 17; Comments of the Universal Service Alliance at 10-11.

⁹ See Illinois State Library Comments on Universal Service Recommended Decision at 2 [hereinafter "Illinois State Library Comments"]; Comments of the Illinois State Board of Education at 5; Comments of the American Association of Community Colleges and the Association of Community College Trustees at 14.

¹⁰ See Comments of Cox Communications, Inc. at 9-10 [hereinafter "Cox Comments"]; Comments of Tele-Communications, Inc. at 9-10; NCTA Comments at 9.

¹¹ See Comments of Metricom, Inc. at 2-3; Comments of Nextel Communications, Inc. at 11-12.

¹² See Comments of America Online, Inc. at 1; Comments of Apple Computer, Inc. at 6; CIX Comments at 3; Comments of Oracle Corporation at 14-15.

¹³ Several parties also recognize that, in order to prevent cross-subsidization and ensure full and fair competition, carriers should be required to bid separately for contracts to provide basic telecommunications services and contracts to provide non-telecommunications products, such as Internet service and inside wiring. See NCTA Comments at 21-22; Cox Comments at 12-13; Comments of Time Warner at 11.

because these entities "do not pay into the USF [Universal Service Fund]." ¹⁴ Some of these parties also assert that allowing ESPs and other Information Technology providers to obtain payments from the universal service funding mechanism would violate Section 254(e), which specifies that eligible telecommunications carriers are to receive universal service support. ¹⁵

The IT Associations do not believe that allowing non-carriers to participate in the schools and libraries program would violate the principle of competitive neutrality. As an initial matter, it is factually incorrect to assert that ESPs will receive compensation from the universal service funding mechanism without having to contribute to it. Under the Joint Board's proposal, both carriers and ESPs are required to contribute to the universal service fund based on those revenues derived from providing telecommunications services. ¹⁶

At the same time, no provider would be required to make universal service payments based on revenues derived from the provision of enhanced services or other non-telecommunications products. Thus, to the extent that a carrier provides enhanced services, it would not be required to contribute to the universal service fund on that portion of its revenues, just as an ESP would not be required to contribute based on the portion of its revenues derived from the provision of enhanced services. There is simply nothing "non-neutral" about a program in which all entities contribute to the universal service fund based on revenues derived from the provision of telecommunications services, no entity contributes to the universal service fund

¹⁴ Comments of BellSouth at 27; see also Comments of Ameritech at 18.

¹⁵ See Comments of Bell Atlantic at 21; Comments of Pacific Telesis Group at 38 [hereinafter "PacTel Comments"].

¹⁶ See Recommended Decision at ¶¶ 784 & 790. ESPs, moreover, will make significant contributions to the universal service fund as a result of their role as large consumers of basic telecommunications services.

based on revenues derived from non-telecommunications offerings, and all entities have an equal opportunity to obtain subsidies to provide non-telecommunications offerings.

The only way that the Commission could violate the competitive neutrality requirement would be to exclude non-telecommunications carriers from participating in the proposed schools and libraries program. Such an approach effectively would provide one class of participants in the highly competitive markets for enhanced services, inside wiring, and CPE -- telecommunications carriers -- with the exclusive right to provide these products to schools and libraries. The foreclosure of this significant market segment could adversely affect competition in the over-all market for these products.¹⁷

Excluding non-carriers from the proposed program also would have an adverse effect on eligible institutions. As Cox Communications explains, "[l]imiting eligibility for subsidies for these services to telecommunications carriers would . . . unreasonably limit the ability of schools, libraries, and health care providers to obtain the services they determine they need from the best, most cost-effective providers."¹⁸ In addition, such an approach would deprive these institutions of the lower prices that would result from competitive bidding, thereby

¹⁷ See CIX Comments at 6 ("Exclusion of some ISPs from the school/library market would impose an improper regulatory distortion in the highly competitive ISP market.").

¹⁸ Cox Communications at 10; see also CIX Comments at 5 (Non-telecommunications carriers may offer "alternative access technologies, such as wireless access, so that schools may avoid the significant costs of re-wiring or other internal connections expenses.").

limiting the total level of goods and services that they could obtain within the \$2.25 billion "cap" proposed by the Joint Board.¹⁹

The IT Associations also do not believe that Section 254(e) prohibits the Commission from authorizing support payments to non-telecommunications carriers that participate in the schools and libraries program. To be sure, this provision contains a general restriction on the entities that are eligible to receive universal support payments. Under well-settled principles of statutory interpretation, however, that general provision must be interpreted in a manner that avoids a conflict with the specific "competitive neutrality" requirement contained in Section 254(h). This is easily done. Pursuant to Section 254(e), only eligible telecommunications carriers may receive universal service support payments to compensate them for the provision of telecommunications services pursuant to the general universal service program. However, this restriction has no applicability to non-telecommunications products provided pursuant to the specific program that Congress established for schools and libraries.

The Commission is not free to disregard the binding policy choices made by Congress. Section 254(d) unambiguously limits universal service payment requirements to entities that provide telecommunications.²⁰ That fact, however, simply does not provide the

¹⁹ See Illinois State Library Comments at 3 (Allowing the participation of non-carrier "Internet service providers and other companies . . . should enable libraries to obtain services at more competitive prices, thereby decreasing the demand for universal service fund reimbursement.").

²⁰ As explained above, there is no conflict between this provision and the "competitive neutrality" requirement in Section 254(h). Therefore, there is no basis for the Commission to depart from the express language of Section 254(d).

basis for the Commission to exclude ESPs and other IT providers from the proposed schools and libraries program.²¹

III. THE COMMENTS SUPPORT LIMITING THE UNIVERSAL SERVICE PROGRAM TO "CORE SERVICES," WITH SUPPORT PAYMENTS BASED ON TELRIC

In their initial comments, each of the three IT Associations supported the definition of "core" services eligible for subsidization proposed by the Joint Board.²² The comments show broad support for this position.²³

In contrast, the comments reveal a divergence of opinion on the question of whether the Commission should base the size of support payments to eligible carriers on a TELRIC-based method, as recommended by the Joint Board, or on an approach that would reflect incumbent carriers' embedded costs. In its comments, MCI persuasively observes that "the use of forward-looking economic cost will preserve and advance universal service, promote

²¹ Pacific Telesis urges that, if non-carrier Internet Service Providers ("ISPs") are allowed to participate in the schools and libraries program, the Commission should provide a subsidy payment to incumbent LECs ("ILECs"). This payment, PacTel proposes, would offset the "implicit subsidy" resulting from the Commission's decision not to require ESPs to make access charge payments to the ILECs. PacTel Comments at 42-43. Contrary to PacTel's contention, ESP/ISPs are not "enjoying an implicit subsidy." Like all end-users, ESPs may access the network using state-tariffed business lines, which are priced above cost. The Commission has tentatively concluded, in the Access Charge proceeding, that because "the existing access charge system includes non-cost basis rates and inefficient rate structures . . . [there is] no reason to extend this regime to . . . the still-evolving information services industry." Access Charge Reform, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, CC Docket No. 96-262, FCC 96-488 ¶ 288 (rel. Dec. 24, 1996).

²² See BSA Comments at 8-9; ITAA Comments at 2; ITI Comments at 2.

²³ See, e.g., TCG Comments at 3-4; Comments of the Citizens For a Sound Economy Foundation at 6.

efficiency, and provide the correct signals for entry, investment, and innovation in the long-run."²⁴ Therefore, as AT&T rightly concludes, "it is imperative that the Commission adopt a model that fully disassociates itself from embedded costs."²⁵ This view is shared by the IT Associations,²⁶ as well as by commenters from numerous affected sectors.²⁷

CONCLUSION

For the foregoing reasons, as well as those contained in the initial comments filed by BSA, ITAA, and ITI, the Commission should limit universal service payments to entities that provide telecommunications services on a common carrier basis; allow ESPs and other information technology providers to participate in the schools and libraries program on a

²⁴ MCI Comments at 2-3.

²⁵ Comments of AT&T Corp. at 13.

²⁶ See BSA Comments at 9-10; ITAA Comments at 2; ITI Comments at 2-3.

²⁷ See, e.g., Comments of the Personal Communications Industry Association at 9 ("Utilizing forward-looking costs, rather than embedded costs, will encourage greater efficiency by recipients of universal service funding and will play an important role in helping to minimize the funds to be collected to support universal service."); Comments of the People of California and the Public Utilities Commission of the State of California On the Recommended Decision at 8.

competitively neutral basis; and limit the universal service program to "core services," with support payments based on TELRIC.

Respectfully submitted.

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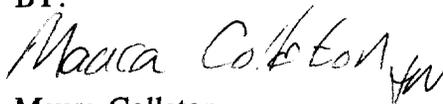
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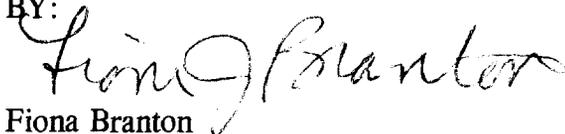
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January 10, 1997

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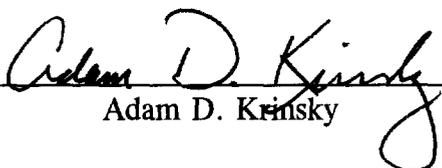
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